PATTI L. KEITH

IBLA 86-187 Decided November 30, 1987

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting color-of-title application ES 35424.

Affirmed as modified.

1. Color or Claim of Title: Generally -- Color or Claim of Title: Applications -- Color or Claim of Title: Good Faith

An applicant who believes or has reason to believe that title to land is in the United States at the time when the applicant acquires title to the land has not established the good faith necessary to support a color-of-title claim.

APPEARANCES: John C. Aldworth, Esq., Marshall, Arkansas, for appellant; Kenneth G. Lee, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Patti L. Keith has appealed from a November 1, 1985, decision of the Eastern States Office, Bureau of Land Management (BLM), rejecting her class 1 color-of-title claim under the Color of Title Act, 43 U.S.C. §§ 1068, 1068a (1982). 1/ The color-of-title claim was filed for a 40-acre parcel described as NE 1/4 NE 1/4 of sec. 31, T. 13 N., R. 17 W., fifth principal meridian in Searcy County, Arkansas.

1/ This classification is found at 43 CFR 2540.0-5(b), which states in pertinent part:

"(b) The claims recognized by the [Color of Title] Act will be referred to in this part as claims of class 1, and claims of class 2. A claim of class 1 is one which has been held in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation. A claim of class 2 is one which has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for the period commencing not later than January 1, 1901, to the date of application, during which time they have paid taxes levied on the land by State and local governmental units."

Appellant and her husband (now deceased) first purchased the parcel in question on November 6, 1972. At that time no title search was made for the property. They subsequently transferred the parcel to their daughter and son-in-law, Sharon and Loris Kay Horton, by warranty deed dated April 10, 1978.

On December 22, 1978, the Hortons executed and delivered a mortgage on the 40-acre parcel for the purpose of obtaining a loan. In conjunction with the mortgage loan, an abstract of title and a title opinion were prepared for the parcel. The abstract was certified "for the use and benefit of" the Hortons on December 21, 1978, and again on January 12, 1979 (Abstract at 81, 83). Both the title opinion and the abstract indicate that the search of the title records found no original patent transferring the land from the United States. On the second page (unnumbered) of the abstract, the abstractors placed the following information: "NOTE: We have made a search for and failed to find an indexed reference to a Patent from the UNITED STATES OF AMERICA TO JAMES E CASTO [the first owner of record] or to any other person conveying: NE NE Sec. 31, Twp. 13 N.R. 17 West. ABSTRACTERS." Notwithstanding this information, an attorney hired by the Hortons rendered a title opinion to the lending bank dated December 22, 1978, to the effect that the borrowers held "marketable title" to the tract. In the letter the attorney further stated:

> The abstracted NE 1/4 NE 1/4 of Section 31, Township 13 North, Range 17 West does not have a patent on record; however a copy should be ordered and placed on record to complete the chain of title. This is merely clerical work and should not delay the closing of this matter as it may take 2 weeks to get the copy and record it.

(Appellant's Statement of Reasons (SOR), Exh. B). 2/

On June 30, 1984, the Hortons conveyed their interest in the parcel back to appellant by quitclaim deed recorded on July 23, 1984. Appellant indicates that this transaction "was a preliminary step in a larger transaction wherein the [appellant] had agreed to sell a large tract of land, originally including the 40-acre tract to a third party. In the course of the title investigation work for the larger transaction, the absence of patent was again noted. In Schedule B 1 (Requirements) of the "Title Insurance Commitment," dated June 15, 1984, the title insurance company retained by the purchaser of the consolidated tract stated that as one of the requirements to be complied with to obtain title insurance coverage, it would be necessary to record a "[p]atent from the United States of America to James E. Casto or any other person, conveying the NE 1/4 NE 1/4 Section 31, Township 13 North, Range 17 West" (Exh. G to Appellant's SOR).

2/ Appellant indicates that the attorney who prepared the abstract and title opinion, John B. Driver, was deceased at the time she submitted her color-of-title application.

Requests to BLM for a copy of the patent were initiated by appellant's attorney on June 19, 1984. On May 30, 1985, appellant was notified by BLM that an "exhaustive search of the records on file in this office failed to show the issuance of a patent from the United States * * *. Legal title, therefore, would appear to be still vested in the United States." Enclosed with the BLM letter was a color-of-title application which appellant completed and filed with BLM on June 21, 1985.

On July 15, 1985, BLM corresponded with appellant's attorney requesting further information necessary to adjudicate appellant's application. In response to this request, appellant's attorney supplied BLM with a copy of the abstract discussed above.

In its November 1, 1985, decision, BLM cited two independent grounds for rejecting appellant's application. The decision first explained that because the title abstract that had been certified to the Hortons, appellant's predecessors-in-interest, contained the note clearly stating that no patent from the United States had been found in the land records, the Hortons had knowledge "that no patent had been issued." BLM further noted that appellant had indicated on the color-of-title application that she learned of the title defect on June 15, 1984, shortly before the property was deeded back to her. The decision reached the following conclusions:

> The Department of the Interior regulations governing color-of-title claims require that the property be held in good faith, 43 C.F.R. 2540.0-5(a). The Interior Board of Land Appeals has held that to hold in good faith the claimant must lack knowledge that the United States owns the property. Lawrence E. Willmorth, 64 IBLA 159 (1982). [3] Because Mrs. Keith's predecessor in title [the Hortons] held the property for over five years with knowledge that no patent had issued and because Mrs. Keith took title with knowledge of this defect, the property could not have been held in good faith for 20 years; and therefore, the claim does not satisfy the requirements of the Color-of-Title Act, 43 U.S.C. 1068, 1068a.

On appeal appellant asserts that she did have the requisite good faith and that neither she nor the Hortons were aware of the lack of a patent until "some time in late June of 1984" (Appellant's SOR at 2). Specifically, she states:

> (d). The only existing Attorney's Opinion on the Abstract of Title to the 40 acre tract [was] found in the Citizens Bank's files. Although the first Opinion dated December 22, 1978, states that a patent should be secured, this was never done and Mortgages were taken by the Bank.

3/ Aff'd, Willmorth v. Watt, No. C-82-518-JLQ (E.D. Wash. July 27, 1987).

> (e). Neither [appellant] nor the Hortons ever read the Abstract of Title prepared in 1978 or the Attorney's Opinions prepared by John Driver.
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> (f). Although a Citizens Bank official may have had knowledge of the absence of a patent, nothing indicates that [appellant] or the Hortons had such notice from Citizens Bank.
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> (g). [Appellant] and the Hortons first received knowledge of the patent problem some time in late June of 1984 when a number of curative steps were being taken over a period of time to enable [appellant] to provide good title for Title Insurance Policy purposes. This was done prior to the proposed sale of a much larger tract of land, including the 40 acre tract.
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> If the mere fact that an Abstract of Title and Attorney's opinion were prepared irregardless [sic] of an applicant's knowledge of their contents, then lack of good faith may somehow be imputed to the applicant. However such a conclusion ignores the facts and creates a forfeiture of property interests. Certainly a lay person can not be charged with constructive knowledge of the contents of an Abstract Title.

In order to establish a class 1 color-of-title claim, a claimant has the burden of proof to show that the public land in question has been held in good faith and in peaceful adverse possession by the claimant and his or her predecessors-in-interest under claim or color of title for more than 20 years. 43 U.S.C. § 1068(a) (1982); John S. Cluett, 52 IBLA 141, 143 (1981). "A claim is not held in good faith where held with knowledge that the land is owned by the United States." 43 CFR 2540.0-5(b). Board decisions have further refined the requirement of good faith. Good faith in adverse possession requires that a claimant honestly believe the land is owned by him. In determining whether the claimant honestly believed that there was no defect in his title, the Department may consider whether such belief was unreasonable in light of the facts actually known to claimant. Lawrence E. Willmorth, supra at 160; William T. Bertagnole, 81 IBLA 34, 45 (1985).

Appellant contends in her statement of reasons for appeal that notwithstanding the fact the abstract and title opinion were prepared at the request of her predecessors-in-interest, they had no actual knowledge of the defect at the time they executed first and second mortgages to secure loans in 1978 and 1980. Appellant asserts that neither she nor her predecessors-in-interest became aware of the title defect before June 1984. In Lawrence E. Willmorth, supra, the Board found a disclaimer in a title insurance policy issued in conjunction with a sale by claimant's predecessor-in-interest to be sufficient to establish lack of good faith where the record showed that there was a simultaneous cessation of payment of real property taxes for several years coupled with a below-market sale price to the claimant. Unlike the Willmorth

case, the present appeal lacks corroborating evidence of knowledge by appellant's predecessors-in-interest of the title defect noted in the abstract prepared in connection with the mortgage. Although this would ordinarily seem implausible, the fact that the attorney was not dissuaded from finding "marketable title," coupled with the fact that loans were apparently made based on first and second mortgages with notice of the lack of patent, lends an air of credibility to appellant's contention. Nevertheless, we find that the decision of BLM must be affirmed on the alternate ground stated in the decision.

[1] Independent of the issue of the knowledge of appellant's predecessors-in-interest regarding the lack of patent, BLM was justified in rejecting the color-of-title application on the ground appellant, herself, had taken title with knowledge of the patent problem. A claimant may not take title to land with knowledge of the interest of the United States in the land and still qualify under the Color of Title Act. Anthony S. Enos, 60 I.D. 329, 331 (1949). "It was during the investigation work for the large transaction between the Applicant and the Bryants that the absence of a patent was referred to in the Title Insurance Commitment dated June 18, 1984" (Appellant's SOR at 2; see Exh. G to appellant's SOR). Consistently, the color-of-title application reflects that appellant learned that she did not have clear title to the land on June 15, 1984 (Application at item 6a). It was not until June 30, 1984, that the parcel was deeded over to appellant. Even if appellant did not learn of the lack of patent until late in the month of June 1984, as indicated in her SOR, it remains undisputed that she received the deed to the land after she learned of the title defect. A color-of-title applicant who believes or has reason to believe that title to land is in the United States at the time he or she acquires the land does not hold color or claim of title in good faith. William T. Bertagnole, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

C. Randall Grant, Jr.
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

James L. Burski
Administrative Judge